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13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION  
15

16 PAULA L. BLAIR, ANDREA ROBINSON,  
17 and FALECHIA A. HARRIS, individually and  
on behalf of all others similarly situated,

18 Plaintiffs,

19 vs.

20 RENT-A-CENTER, INC., a Delaware  
corporation; RENT-A-CENTER WEST, INC.,  
21 a Delaware corporation; and DOES 1-50,  
inclusive,

22 Defendants.  
23

CASE NO. 3:17-CV-02335-WHA

**PLAINTIFFS' REPLY MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR CLASS  
CERTIFICATION**

Date: August 23, 2018  
Time: 8:00 a.m.  
Ctrm.: 12  
Judge: Hon. William Alsup

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1 **I. INTRODUCTION**

2 Defendants Rent-A-Center Inc.'s and Rent-A-Center West, Inc.'s ("RAC's") opposition to  
 3 class certification focuses more on the substantive merits of plaintiffs' claims than on the  
 4 appropriateness of adjudicating those claims on a classwide basis. For example, although RAC  
 5 asserts that plaintiffs have failed to identify "common" claims, at the same time it argues that the  
 6 principal legal issues can be decided in RAC's favor on summary judgment because they are  
 7 "purely legal, factually uncontested, and can serve to narrow the issues in this case going  
 8 forward," Dkt. 118 at 1 – which necessarily means they can be resolved on a classwide basis.

9 Plaintiffs agree that many of their claims rest upon statutory issues that can be decided as a  
 10 matter of law, including the parties' disputes over: (1) the proper interpretation of "Lessor's Cost"  
 11 under the Karnette Act, including whether it can include "upcharges" for intra-company transfers;  
 12 (2) whether RAC's separate rental-purchase agreement and arbitration agreement constitute a  
 13 "single document" within the meaning of the Karnette Act; and (3) whether RAC may ignore  
 14 certain rebates received from suppliers when calculating its "Lessor's Cost." As plaintiffs have  
 15 shown, once these and other threshold liability questions have been answered – on a classwide  
 16 basis – the resulting damages owed by RAC can be established by simple arithmetic based on  
 17 statutory formulae and RAC's records. Mot. at 14-17.

18 RAC contends that it will be too difficult for plaintiffs to prove damages on a classwide  
 19 basis, even if plaintiffs establish classwide liability. This argument ignores that the Karnette Act  
 20 requires rent-to-own companies maintain records necessary to prove compliance, Cal. Civ. Code  
 21 §1812.644(a), and that this Court has ordered RAC to produce such records. Dkt. 80. RAC did,  
 22 in fact, produce a searchable database and other records that establish the details of every rent-to-  
 23 own transaction during the class period. Indeed, RAC's own expert was able to apply the Karnette  
 24 Act's statutory formulae to RAC's data to identify the number of pricing violations during the  
 25 class period under RAC's theory of the case (i.e., accepting RAC's allocation of estimated intra-  
 26 company transfer costs to RAC's "Lessor's Cost" to calculate maximum prices under the Act).  
 27 RAC *concedes* that the number of transactions its expert identified – 49,332, or 4.7% of RAC's  
 28 rental-purchase agreements ("RPAs") during the class period – "had prices that exceeded the

1 Karnette Act's maximums," *even under its own theory*. Opp. at 19. Under plaintiffs' construction  
2 of the Act, that number is much higher – but just as easily calculated.

3 Liability can be proven or disproven in this case on a classwide basis. The Court will use  
4 traditional tools of statutory construction to decide whether plaintiffs are right or wrong about the  
5 threshold legal issues. Then, if the Court accepts plaintiffs' analysis of the statute's requirements,  
6 RAC's own transactions database and other electronic records can be used to determine which  
7 transactions were unlawful and what remedies the statute requires. If there are material gaps or  
8 errors in RAC's database, the appropriateness of burden-shifting and inference-drawing in favor of  
9 plaintiffs will raise common issues as well, because RAC had exclusive access to its transaction-  
10 and-pricing data and had an affirmative statutory duty to maintain records sufficient to establish  
11 Karnette Act compliance. Careless or inadequate recordkeeping cannot be a shield against class  
12 certification. *See Etter v. Allstate Ins. Co.*, 323 F.R.D. 308, 315 (N.D. Cal. 2017).

13 RAC also challenges the adequacy of the named plaintiffs, but misstates the standard.  
14 Rule 23(a)(4) requires only that class representatives have no conflicts of interest with other class  
15 members and be willing and able to prosecute the action vigorously on behalf of the class. Here,  
16 the named plaintiffs have already demonstrated their adequacy, and RAC does not challenge the  
17 adequacy of proposed class counsel.

18 In this case, a class action is the only procedural mechanism available to protect the  
19 statutory rights of RAC's California consumers. Very few consumers understand their rights  
20 under the Karnette Act, or even know the statute exists. Fewer still have the resources needed to  
21 analyze the elements of RAC's calculations of Lessor's Cost and maximum pricing. Even if a  
22 handful of class members had such resources (unlikely, given the consumer population targeted by  
23 RAC), the costs of conducting the required analysis would far outstrip their potential individual  
24 recoveries. The economies of scale inherent in class action litigation is what makes the analysis  
25 and presentation of proof in this case economically feasible. This is one of those cases where the  
26 violations are real, the economic harms to low-income consumers are substantial, but because the  
27 costs of proof are so dauntingly high, there is insufficient "incentive for any individual to bring a  
28

1 solo action prosecuting his or her rights.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617  
 2 (1997) (internal quotation marks omitted).

## 3 **II. ARGUMENT**

### 4 **A. RAC Has Waived Any Argument Based on the Class Arbitration Prohibition** 5 **in Its Arbitration Agreement**

6 After this Court mostly denied RAC’s motion to compel arbitration in October 2017, it  
 7 *initially* ruled, without the benefit of any briefing by the parties, that plaintiff Paula Blair could not  
 8 pursue any of her claims in court on a class action basis because of the class arbitration prohibition  
 9 in RAC’s form Arbitration Agreement. Plaintiffs promptly moved for reconsideration, pointing  
 10 out that RAC’s class arbitration prohibition, by its terms, had no application to claims pursued in  
 11 court. *See* Dkt. 70. Plaintiffs also explained that even if RAC’s Arbitration Agreement had  
 12 prohibited class actions in court, that prohibition would be invalid and unenforceable under  
 13 controlling California law. *Id.* In response, the Court vacated its initial order and issued an  
 14 amended order removing the language striking Blair’s class action allegations. Dkt. 82, 83.  
 15 Instead of deciding the issue on reconsideration, though, the Court ruled that these “[i]ssues  
 16 regarding class action claims will be decided at the class certification hearing,” and it specifically  
 17 instructed that “[t]he defendants shall brief this issue as part of any opposition to class  
 18 certification.” Dkt. 83.

19 Despite the Court’s invitation, and despite the fact that plaintiffs briefed the issue in their  
 20 motion for class certification, Mot. at 21-25, RAC has chosen *not* to argue that any language in its  
 21 form Arbitration Agreement precludes plaintiffs from pursuing their claims in court on a class  
 22 action basis. For that reason, any such argument is waived. *See In re Yahoo Shareholder*  
 23 *Derivative Litig.*, 153 F.Supp.3d 1107, 1124 n.11 (N.D. Cal. 2015).

### 24 **B. The Rule 23 Requirements Are Met**

#### 25 **1. Plaintiffs’ Claims Present Common Issues**

26 Plaintiffs’ claims present significant common issues that will drive the resolution of this  
 27 case. Plaintiffs allege two main theories of liability under the Kernet Act: first, that RAC  
 28 charges class members prices that exceed the statutory maxims; and second, that RAC fails to

1 comply with the Act's "single document" requirement. RAC challenges parts of both theories in  
 2 its recently filed motion for partial summary judgment, which focuses on plaintiffs' claims that:  
 3 (1) RAC is not allowed to include in its "Lessor's Cost" its estimated intra-company transfer costs  
 4 that do not reflect any *actual* freight expense for shipping an item *to* RAC *from* a wholesaler,  
 5 distributor, supplier, or manufacturer;<sup>1</sup> and (2) RAC's practice of presenting customers with a  
 6 rental-purchase agreement and a separate arbitration agreement violates the Karmette Act's "single  
 7 document" requirement.<sup>2</sup> RAC asserts that these issues are "purely legal, factually uncontested,  
 8 and can serve to narrow the issues in this case going forward," Dkt. 118 at 1, thus essentially  
 9 conceding the existence of common issues supporting class certification. *See Abdullah v. U.S.*  
 10 *Sec. Assoc., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (issue is common where "determination of its  
 11 truth or falsity will resolve an issue that is central to the validity of each claim in one stroke").<sup>3</sup>

12 Having effectively conceded that the "single document" claim is amenable to class  
 13 certification, RAC nevertheless argues that a class should not be certified for plaintiffs' other  
 14 Karmette Act pricing claims because pricing violations may result from any combination of one or  
 15 more of its allegedly unlawful practices – e.g., mis-categorizing products when calculating the  
 16 maximum price, improperly including transfer costs in its "Lessor's Cost," and not accounting for  
 17 rebates. Opp. at 13-17. But each of those violations can be independently identified and  
 18 calculated by applying the statutory formulae to RAC's transactions database, even when two or  
 19 more violations apply to a single transaction. The fact that different damages may have been

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21  
 22 <sup>1</sup> See Cal. Civ. Code §1812.622(k) ("Lessor's cost' means the documented actual cost, including  
 23 actual freight charges, of the rental property to the lessor from a wholesaler, distributor, supplier,  
 or manufacturer and net of any discounts, rebates, and incentives."). Unless otherwise noted, all  
 further statutory references are to the Cal. Civil Code.

24 <sup>2</sup> See Civ. Code §1812.623(a) ("Every rental-purchase agreement shall be contained in a single  
 25 document which shall set forth all of the agreements of the lessor and the consumer with respect to  
 the rights and obligations of each party.").

26 <sup>3</sup> Although RAC addresses plaintiffs' "single document" claim in its motion for summary  
 27 judgment, Dkt. 109 at 20, 24-25, it entirely ignores that claim in opposing class certification, other  
 28 than acknowledging in a footnote that "the same practice was applied to all class members during  
 the class period." Opp. at 12 n.12.

1 suffered by different class members because defendant committed several statutory violations  
 2 cannot defeat class certification. *See Abdullah*, 731 F.3d at 957; *Am. Council of the Blind v.*  
 3 *Astrue*, No. C 05-04696 WHA, 2008 WL 4279674, at \*3 (N.D. Cal. Sept. 11, 2008). That is  
 4 because for each transaction, whether there was a Kernet Act pricing violation (regardless of the  
 5 cause), and if so, what damages resulted, can be determined as a matter of arithmetic and applying  
 6 the appropriate formula. Kwon Decl. ¶¶24-27 (Dkt. 120-38); Breshears Decl. ¶¶8-19 (Dkt. 109).

7 In RAC's view, an issue cannot be "common" unless it applies to each and every member  
 8 of the class. That has never been the law. The class is defined to include all of RAC's California  
 9 customers because that is the universe of individuals who, during the class period, could have been  
 10 deprived of their Kernet Act and other statutory rights by RAC, based on the pricing and other  
 11 violations alleged by plaintiffs. Plaintiffs do not have to prove that each alleged violation affected  
 12 every RAC customer during the class period, just that an efficient mechanism exists, using  
 13 classwide evidence (principally the transactions database and evidence establishing the nature of  
 14 the challenged practices) to determine which class members have been harmed and what damages  
 15 are due – all of which is provable here using classwide evidence.

16 RAC argues that although during the class period it included intra-company transfer  
 17 upcharges in its Lessor's Cost for more than 254,000 items of merchandise (and counting, because  
 18 these unlawful practices continue – which is why a public injunction is necessary as an element of  
 19 the requested relief), its alleged upcharge violations do not present a "common" issue because  
 20 RAC also rented items that were *not* shipped by NFI or NPS and therefore did not result in an  
 21 upcharge. Opp. at 15-16.<sup>4</sup> Similarly, RAC asserts that of the 1.2 million items sold to customers  
 22

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23  
 24 <sup>4</sup> RAC characterizes the term "upcharge" as *plaintiffs'* description of RAC's inclusion of intra-  
 25 company transfer costs when computing statutory maximum prices, arguing that it "is an  
 26 allocation of actual cost, which does not reflect any profit margin to RAC." Opp. at 4 n.8. In fact,  
 27 "up charge" is the term used in RAC's computer systems to describe these estimated cost  
 28 allocations, *see* Dkt. 109-12 (Dostart Decl. Exh. 10, RAC-000458) (filed under seal). Although it  
 does not directly represent profit, these cost allocations increase RAC's profits by artificially  
 raising the statutory maximum prices. For example, for a new appliance, which is subject to  
 successive multipliers of 1.65 and 2.25, Civ. Code §1812.644(c), a transfer upcharge of \$23.49  
 inflates the Total of Payments by \$87.20.

1 during the class period, only 13,600 were the subject of a trailing rebate or credit for which RAC  
 2 did not adjust the Lessor's Cost, Opp. at 14; that only 49,332 transactions exceed the Karnette Act  
 3 pricing maximums *if* no reductions are made to account for intra-company transfer upcharges or a  
 4 trailing rebate or credit, Opp. at 19; and that 1,062 used items for which RAC had previously  
 5 received rental income were categorized as "new." Opp. at 13. But the precision of those  
 6 numbers demonstrates why this case is appropriate for certification. Regardless of how many  
 7 violations the Court finds (after conducting the necessary statutory construction) and no matter  
 8 how large the ultimate award of damages resulting from those violations, RAC effectively  
 9 concedes that once the Court tells us what the statute means, the rest is arithmetic. At that point,  
 10 the parties' experts can apply the formulas and algorithms to the data and determine which class  
 11 members suffered which violations, on which transactions, in what amounts.

12 Commonality "does not require a finding that all members of the class have suffered  
 13 identical injuries." *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014). "[E]ven a well-defined  
 14 class may inevitably contain some individuals who have suffered no harm as a result of a  
 15 defendant's unlawful conduct." *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1136 (9th Cir.  
 16 2016).<sup>5</sup> The same is true of plaintiffs' proposed public injunction class. The Rule 23 Advisory  
 17 Committee's Note explains that class certification is appropriate even if the defendant's action or  
 18 inaction "has taken effect or is threatened only as to one or a few members of the class, provided it  
 19 is based on grounds which have general application to the class." F.R.C.P. 23(b)(2), 1966  
 20 Amendment advisory committee note. Further, although there is no need in this case, it would be  
 21 possible to define classes or subclasses to correspond to the issues RAC raises. For example,  
 22 although most transactions did not involve the mischaracterization of an item as "new," those that  
 23 did can be readily identified from the RAC database. Thus, if the Court deems it necessary or

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 25  
 26 <sup>5</sup> *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), cited by RAC, Opp. at 21-22, is  
 27 not the contrary. There, plaintiffs' proposed class was not well defined because a narrower  
 28 definition could easily eliminate those who were not subject to the allegedly unlawful conduct.  
 655 F.3d at 1024. Moreover, because damages may be calculated by reference to RAC's records  
 in this case, there is no risk that anyone who has not been harmed will be compensated.

desirable, one or more classes or subclasses could be designated – although there seems to be no reason to do so. *See Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001) (noting district court’s discretion to redefine class), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005).

## 2. Common Issues Predominate

In an effort to challenge predominance, RAC argues that its transactions database, spreadsheets of transfer upcharges, rebate/credit data, and other business records are inadequate as a source of “common proof,” and that individualized inquiries are therefore necessary to establish liability for pricing violations. Opp. at 8-9, 14-17. With this argument, RAC walks a fine line between, on one hand, furthering its incentive to avert class certification and, on the other, acknowledging violation of (1) its statutory obligation to maintain such records,<sup>6</sup> and (2) its obligation to comply with the Court’s order requiring it to produce information “sufficient to establish the Lessor’s Cost” of each item of merchandise, and information “sufficient to calculate the formulas under the Karmette Act (e.g., maximum cash price and maximum total payments, etc.).” Dkt. 80. In fact, the information necessary to determine liability for pricing violations and assess damages is available in electronic databases and other electronic records maintained by RAC, most of which have already been produced in discovery. Mot. at 14-16. To the extent RAC argues otherwise, its failure to fulfill its obligation to maintain and produce such records cannot defeat certification.

RAC maintains sophisticated IT systems to track and record its purchasing, supply chain, and customer transactions. During discovery, RAC produced a transactions database that contains pertinent information regarding every rental-purchase transaction in California during the class period. Dkt. 91-1 (Cross Decl.); *see also* Dkt. 80 (order describing required content of

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<sup>6</sup> *See* Cal. Civ. Code §1812.644(a) (“A lessor shall maintain records that establish the lessor’s cost, as defined in subdivision (k) of Section 1812.622, for each item of personal property that is the subject of the rental-purchase agreement. A copy of each rental-purchase agreement and of the records required by this subdivision shall be maintained for two years following the termination of the agreement.”).

1 transactions database). RAC has also produced electronic spreadsheets reflecting the amount of  
 2 any NFI- or NPS-related upcharge as to each item of property. Dkt. 109-17, 109-19 (Dostart Decl.  
 3 Exhs. 15, 17) (filed under seal). RAC has also produced records concerning each trailing rebate or  
 4 credit that was received. Dkt. 109-9 (Holihan Depo. Tr. 121:16 – 122:7).

5 In spite of the scope of existing data (largely from what RAC refers to as its “data  
 6 warehouse”), RAC argues that information produced cannot provide common proof of the alleged  
 7 violations. RAC contends that its transactions database contains “some errors,” Opp. at 8-9, but  
 8 does not specify what they are. RAC contends that its upcharges cannot be “easily link[ed]” to the  
 9 items in the transactions database. Opp. at 16. RAC also contends that too much detailed analysis  
 10 would be required to identify items sold in California that were subject to a documented rebate or  
 11 credit for which RAC did not adjust its Lessor’s Cost. Opp. at 6-7.<sup>7</sup>

12 None of these arguments are sufficient to prevent class certification. With respect to the  
 13 transactions database, RAC’s own expert has concluded that the database is accurate and  
 14 complete. Kwon Decl. ¶10 (Dkt. 120-38). Kwon’s declaration also establishes she has already  
 15 used the database to identify transactions in which, even without adjusting Lessor’s Cost to reflect  
 16 transfer upcharges or rebates/credits, the Cash Price or Total of Payments exceeded a statutory  
 17

18  
 19 <sup>7</sup> RAC’s citation to *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478 (N.D. Cal.  
 20 2008), is unavailing. Opp. at 15. In that case, plaintiffs sought certification of a “massive” class  
 21 to pursue multi-district antitrust claims, requiring plaintiffs to prove that defendants’ practices had  
 a “common impact” on price negotiations with hundreds of different purchasers in very different  
 circumstances. 253 F.R.D. at 483. The court noted:

22 [T]he overwhelming majority of wholesale-purchaser transactions were made after  
 23 individualized negotiations between defendants and the particular wholesale  
 24 purchaser. Several factors influenced these negotiations, including the volume of  
 25 the purchase, the particular market power of the wholesale purchaser, the extent of  
 26 customization of the product, the specific market for which the chip or card was  
 designed for (i.e., desktop, notebook, workstation, etc.), the degree of customer  
 support, the performance level of the chip or card, and the varying representations  
 and warranties that were included in the sales contract. No doubt other purchaser-  
 specific factors played a role in the negotiations.

27 *Id.* at 480-81. *In re Graphics* is a far cry from this case, in which plaintiffs need not prove abstract  
 28 “common impact” on disparate price negotiations, but need only prove that RAC’s prices  
 exceeded statutory maximums determined by common formulae applied to a database.

1 maximum. Kwon Decl. ¶¶18-27 (Dkt 120-38).<sup>8</sup> Moreover, RAC asserts that it uses a “Legal  
 2 Engine software program” to “ensure that RAC complies with pricing laws, including the Karmette  
 3 Act.” Opp. at 5. If RAC can use a software program to determine statutory maximum prices for  
 4 each individual item of merchandise (based on its theory of what costs should be included in  
 5 “Lessor’s Cost” under the Karmette Act), it cannot now argue that such a classwide analysis (based  
 6 on plaintiffs’ theory) is impossible to conduct.

7 With respect to rebates and credits, RAC’s expert has identified about 13,600 items of  
 8 merchandise as to which the Lessor’s Cost was not adjusted. Davis Decl. ¶37 (Dkt. 120-42).  
 9 Because RAC tracks merchandise by item number and serial number (both of which are including  
 10 in RAC’s transactions database), those records can also be used to determine which items ended  
 11 up being rented in California.<sup>9</sup>

12 With respect to the upcharge spreadsheets, RAC has not identified a single instance in  
 13 which an upcharge cannot be linked to a particular transaction. RAC tries to support its argument  
 14 that the upcharge spreadsheets might not be “easy” to match to its transactions database by citing  
 15 snippets from the deposition of plaintiffs’ expert, David Breshears. Opp. at 16. But RAC did not  
 16 produce the upcharge spreadsheets until just a few days before the filing deadline for plaintiffs’  
 17 motion for class certification, and as a result, the analysis set forth in Breshears’ initial declaration  
 18 was preliminary, as he expressly stated at the time. Breshears Decl. ¶¶16-19 (Dkt. 109-20). Since  
 19 \_\_\_\_\_

20 <sup>8</sup> Kwon’s calculations of pricing violations are premised on RAC’s theory of the case, most  
 21 notably its contention that it is entitled to include estimated intra-company transfer costs in the  
 22 “Lessor’s Cost” for purposes of determining statutory maximum prices. Kwon Decl. ¶25 (Dkt.  
 23 120-38). At the class certification stage, however, it is plaintiffs’ theory of the case that controls.  
 24 See *Wit v. United Behavioral Health*, 2017 WL 3478775, at \*11 (N.D. Cal. Aug. 14, 2017)  
 25 (“[T]he ultimate question addressed in the Class Certification Order was whether Plaintiffs’ claims  
 were amenable to class treatment under Rule 23 when considered in light of Plaintiffs’ theories of  
 the case.”). Moreover, the fact that RAC acknowledges that even under its theory of the case  
 some 49,332 transactions, approximately 4.7% of the transactions during the class period, violated  
 the Karmette Act’s pricing provisions, Opp. at 19, Kwon Decl. ¶45, is sufficient to support  
 certification.

26 <sup>9</sup> Regardless, even if it proves impossible to locate items for which RAC received trailing rebates,  
 27 that does not prevent certification of class to pursue RAC’s pricing violations based on other errors,  
 28 such as its inclusion of intra-company transfer costs in “Lessor’s Cost” for purposes of calculating  
 statutory maximum prices.

1 that date, Breshears has confirmed his initial, preliminary conclusion that the upcharges can in fact  
 2 be linked to particular transactions in the database. Supplemental Declaration of David Breshears  
 3 ¶¶3-5 (filed herewith). Further, RAC’s counsel has confirmed that “RAC has produced sufficient  
 4 information to link an item listed in RAC-1253 and RAC-1254 [identifying intra-company transfer  
 5 cost allocations] to an item in the Litigation Database.” Declaration of Eric P. Brown ¶2 (filed  
 6 herewith). Indeed, RAC was able to allocate these upcharges on an item-by-item basis to include  
 7 them in the “Lessor’s Cost” when calculating prices for each item of merchandise (other than  
 8 furniture) sold during the class period. It cannot credibly argue now that those same upcharge  
 9 amounts cannot be subtracted if that is what the Karmette Act requires.<sup>10</sup>

10 Accordingly, the evidence demonstrates that classwide proof is possible. Even if the Court  
 11 were to accept RAC’s arguments concerning deficiencies in its recordkeeping, that cannot defeat  
 12 certification. Courts routinely shift the burden of proof on facts essential to a claim where  
 13 defendants assert that their records are inadequate, but plaintiffs have no meaningful access to the  
 14 necessary information. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946);  
 15 *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1189-90 (2008). Burden-shifting is  
 16 especially appropriate where, as here, the defendant had a statutory obligation to maintain the  
 17 necessary records. *See Mt. Clemens*, 328 U.S. at 687-88. This is no less true at the class  
 18 certification stage. *See, e.g., Etter*, 323 F.R.D. at 315 (defendants “should not benefit from their  
 19 poor recordkeeping by dodging a class action on that basis”); *Saechao v. Landry’s Inc.*, No. C 15-  
 20 00815 WHA, 2016 WL 1029479, at \*4 (N.D. Cal. Mar. 15, 2016) (employer’s timesheet records  
 21 were a common method of proof, and any failure to record breaks “is its own fault.”). Indeed,  
 22 whether burden-shifting is appropriate here is another predominating common issue. Mot. at 16.

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 25  
 26 <sup>10</sup> In advance of trial, plaintiffs will present a trial plan as required by this Court’s Guidelines for  
 27 Trial and Final Pretrial Conference. At this time, it is sufficient to show that plaintiffs’ claims  
 28 may be resolved on a classwide basis and that “class resolution” is “superior to other available  
 methods for the fair and efficient adjudication of the controversy.” *Hanlon v. Chrysler Corp.*, 150  
 F.3d 1011, 1022 (9th Cir. 1998). Nothing more is required at this stage. *See Opp.* at 22.

### 3. The Named Plaintiffs' Claims Are Typical

RAC argues that typicality is not satisfied with respect to class members for whom a Karnette Act pricing violation arose from RAC's failure to adjust its Lessor's Cost to reflect a rebate or credit, and those whose merchandise was mischaracterized as "new." Opp. at 13-14, 17. (Notably, RAC raises no such argument regarding any other violations.) But in the Ninth Circuit, "the typicality requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010); *see also Parsons*, 754 F.3d at 685 ("[T]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.").

RAC's course of conduct and class members' resulting injuries are sufficiently similar to satisfy the typicality element of Rule 23. "It does not matter that the named plaintiffs may have in the past suffered varying injuries . . . Rule 23(a)(3) . . . [does not require] that they be identically positioned to each other or to every class member." *Parsons*, 754 F.3d at 686. Nevertheless, if the Court believes there must be a class representative personally affected by RAC's failure to adjust Lessor's Cost for a rebate or credit, or for whom a used item was characterized as new, plaintiffs should be granted leave to propose one or more such individuals as class representatives.

### 4. The Proposed Class Representatives Are Adequate

Adequacy of representation is judged by two criteria: First class representatives must "have [no] conflicts of interest with other class members," and, second, they must be willing and able to "prosecute the action vigorously on behalf of the class." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). RAC does not contend that any conflict of interest renders named plaintiffs inadequate. Rather, it argues that they are not sufficiently sophisticated to represent the proposed class. Opp. at 23-24.

"[T]he Ninth Circuit has never imposed a knowledge requirement on proposed class representatives." *Urakhchin v. Allianz Asset Mgmt. of Am., LP*, No. 8:15-cv-1614, 2017 WL 2655678, at \*6 (C.D. Cal. Jun. 15, 2017) (internal quotation marks omitted). Indeed, the Supreme Court has held that certification of a shareholder derivative class action may be appropriate even

1 where the named plaintiff “knew nothing about the content of the suit,” “[was] uneducated  
 2 generally and illiterate in economic matters.” *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 372  
 3 (1966). Class representatives are adequate if they “have at least a rudimentary understanding of  
 4 the nature of the present action and they have a demonstrated willingness to assist counsel in the  
 5 prosecution of the litigation.” *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives &*  
 6 *Composites, Inc.*, 209 F.R.D. 159, 165 (C.D. Cal. 2002). In complex areas of law, “it is not  
 7 surprising that [plaintiffs] cannot articulate the nature of their claims” in detail. *George v. Kraft*  
 8 *Foods Global, Inc.*, 251 F.R.D. 338, 351 (N.D. Ill. 2008). “[A] court must be wary of a  
 9 defendant’s efforts to defeat representation of a class on grounds of inadequacy when the effect  
 10 may be to eliminate any class representation[.]” *In re Comp. Memories Sec. Litig.*, 111 F.R.D.  
 11 675, 682 (N.D. Cal. 1986).

12 Here, RAC’s attempts to manufacture evidence of inadequacy are unpersuasive. For  
 13 Andrea Robinson, RAC deems it “important[.]” that, at her deposition, before being shown a copy,  
 14 she did not know what defense counsel was referring to as “the Complaint.” Opp. at 12. But  
 15 Robinson recognized the Second Amended Complaint upon being shown a copy and recalled that  
 16 she reviewed it before it was filed. Dkt. 120-17 (Robinson Tr. 121:1 – 122:6). RAC challenges  
 17 Falechia Harris by asserting that she was “convicted of fraud for trying to cash a check that did not  
 18 belong to her and then skipping out on her court hearing, resulting in a bench warrant” and that  
 19 she had several credit card disputes. Opp. at 16. But the check incident took place “more than 25  
 20 years ago” and the credit card disputes were “about ten years ago.” Dkt. 120-16 (Harris Tr. 14:10,  
 21 17:6 – 18:18). Ms. Harris has been employed for the past 14 years with Catholic Charities  
 22 Treasure Island Supportive Housing Program, and for the six years before that with Homeless  
 23 Prenatal Program as a substance abuse case manager. Brown Decl. Ex. 1 (Harris Tr. 23:9 – 25:1).  
 24 For Paula Blair, RAC finds it significant that she never opened the Microsoft Xbox that she rented  
 25 from RAC on March 11, 2016. Opp. at 1, 9-10. But it was only after renting the Xbox that Blair  
 26 learned that Internet service is required in order to use it; and since she did not have Internet  
 27 access at that time, she “basically was stuck.” Brown Decl. Exh. 2 (Blair Tr. 119:20-25). RAC  
 28

1 has nothing bad to say about Celinda Garza, except that she rejected the RAC arbitration  
2 agreement after consulting with counsel. Opp. at 11.

3       There is nothing unusual or improper about a class representative learning of alleged  
4 illegal conduct through consultation with counsel, and it is certainly not grounds for denying class  
5 certification. *See Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 106, 111 (N.D. Cal. 2008) (rejecting  
6 contention that proposed representatives were inadequate because they contacted counsel in  
7 response to newspaper advertisement without previous awareness of claims); *Kennedy v. United*  
8 *Healthcare of Ohio, Inc.*, 206 F.R.D. 191, 197 (S.D. Ohio 2002) (First Amendment “forbids denial  
9 of class certification for solicitation of potential class representatives”); *Jerry Enters. v. Allied Bev.*  
10 *Group, LLC*, 178 F.R.D. 437, 445 (D.N.J. 1998) (“a lack of *ex ante* ‘claims consciousness’ does  
11 not demonstrate [plaintiff’s] inadequacy as the class representative”; no surprise” that plaintiffs  
12 “not educated in substantive or procedural aspects of the law” would not know of claims).<sup>11</sup>

13       Here, proposed class representatives testified that they are pursuing claims based on  
14 RAC’s unlawful pricing. Brown Decl. Exh. 1 (Harris Tr. 60:24 – 61:25), Exh. 2 (Blair Tr. 57:21 –  
15 58:5), Exh. 3 (Garza Tr. 151:3-11), Exh. 4 (Robinson Tr. 35:16 – 36:1). Further, RAC does not  
16 dispute that each of the proposed class representatives understands and accepts the duties of class  
17 representatives, have responded to discovery and sat for lengthy depositions, or that Ms. Harris  
18 attended two mediation sessions at the Ninth Circuit Court of Appeals. Mot. at 13. They have  
19 done what is expected of class representatives, and should be appointed.

20 \_\_\_\_\_  
21 <sup>11</sup> *Bodner v. Oreck Direct, LLC*, No. C 06-4756 MHP, 2007 WL 1223777 (N.D. Cal. Apr. 25,  
22 2007), cited by RAC, Opp. at 23-24, does not require a different outcome. There the proposed  
23 class representatives demonstrated an “undeniable and overwhelming ignorance regarding the  
24 nature of this action, the facts alleged, and the theories of relief against defendant.” *Id.* at \*2.  
25 Moreover, plaintiffs’ counsel in *Bodner* had previously been disqualified for filing ten class  
26 actions in which either a lawyer at the law firm, or a relative of one of the lawyers, was the named  
27 plaintiff. *Id.* at \*6. *Bodner* is often invoked by defendants seeking to avoid class certification, but  
28 is usually distinguished as not persuasive outside its particular facts. *See, e.g., Trosper v. Stryker Corp.*, 2014 WL 4145448, at \*13 (N.D. Cal. Aug. 21, 2014) (given that defendant did not contest appointment of class counsel, invocation of *Bodner* was unpersuasive); *Kanawi*, 254 F.R.D. at 102, 111 (rejecting contention that plaintiffs who contacted class counsel in response to a newspaper advertisement were thereby inadequate). Similarly, in *Sanchez v. Wal Mart Stores, Inc.*, 2009 WL 1514435 (E.D. Cal. May 28, 2009), cited by RAC, Opp. at 23, the court’s primary concern was “strategic claim-splitting,” which created a conflict of interest. *Id.* at \*3.

**C. The Usury Subclass Should Be Certified**

Although this Court held that plaintiff Blair's usury claim arising from her 2015 RPA was subject to mandatory arbitration, it allowed her to pursue her 2016 usury claim in court because her 2016 transaction was not subject to a binding arbitration agreement.<sup>12</sup> Plaintiffs have since determined that RAC does not have valid, signed arbitration agreements for many, and probably most class members – perhaps as many as 75% of them (as plaintiffs will demonstrate in opposition to RAC's summary judgment motion). Plaintiffs therefore seek to certify a subclass class comprised of those California customers for whom RAC is unable to produce a signed arbitration agreement, to pursue usury claims. Mot. at 18.

In opposition, RAC first argues that numerosity is not satisfied because only four people attempted to opt out of RAC's arbitration agreement during the class period. Opp. at 20. But the proposed subclass includes all class members for whom RAC is unable to produce a signed arbitration agreement, and RAC has stipulated that any proposed subclass "of California consumers for whom RAC cannot produce a signed arbitration agreement is sufficiently numerous for purposes of Fed. R. Civ. Pro. 23(a)(1)." Dkt. 104 ¶1. RAC's stipulation is unsurprising given its acknowledgment that it cannot produce signed arbitration agreements for three of the four transactions to which named plaintiffs are party. Dkt. 54. To the extent that RAC argues that class members for whom it cannot produce a signed arbitration agreement are nonetheless bound by that agreement, it is mistaken. *See Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015) ("A party seeking to compel arbitration has the burden under the FAA to show (1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue.").

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<sup>12</sup> This Court held that while Blair is not required to arbitrate her Karmette Act, CLRA, and UCL claims, she is required to arbitrate any usury claim arising from her 2015 RPA. Dkt. 82. RAC did not, however, move to compel arbitration of claims arising out of Blair's 2016 rental-purchase agreement because she opted out of the arbitration agreement for that transaction. RAC also acknowledged that it does not have a signed arbitration agreement relating to plaintiff Robinson's or plaintiff's Harris's transactions and, thus, did not move to compel arbitration of any of their claims. Dkt. 54. Proposed class representative Celinda Garza opted out of the arbitration agreement relating to her transaction. Opp. at 11.

1 RAC next argues that there are questions about how usury law should to be applied to rent-  
 2 to-own contracts. Opp. at 20-21. But, as plaintiffs explained in their motion, these issues present  
 3 common questions supporting class certification. Mot. at 18. Many courts have certified usury or  
 4 related claims, and appellate courts have upheld class certification, upheld classwide judgments, or  
 5 overturned trial court orders denying certification of such claims, including several notable cases  
 6 against RAC itself. *See, e.g., Madden v. Midland Funding, LLC*, 786 F.3d 246, 254-55 (2d Cir.  
 7 2015); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 893-94, 899-901 (8th Cir. 1999); *Fogie v.*  
 8 *THORN Ams., Inc.*, 95 F.3d 645 (8th Cir. 1996); *Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762  
 9 (E.D. Wis. 1996); *Henry v. Cash Today, Inc.*, 199 F.R.D. 566 (S.D. Tex. 2000); *Upshaw v. Ga.*  
 10 *Catalog Sales, Inc.*, 206 F.R.D. 694 (M.D. Ga. 2002); *McConnell v. Merrill Lynch, Pierce, Fenner*  
 11 *& Smith*, 33 Cal. 3d 816 (1983). As the Fifth Circuit explained with respect to a usury claim, class  
 12 action procedures are “not only superior to other methods but singularly appropriate for the  
 13 adjudication of this controversy.” *Roper v. Conserve, Inc.*, 578 F.2d 1106, 1108 (5th Cir. 1978).

#### 14 **D. Certification Is Also Appropriate Under Rule 23(b)(2)**

15 In addition to certification under Rule 23(b)(3), Plaintiffs also seek certification of a class  
 16 to pursue injunctive and declaratory relief pursuant to Rule 23(b)(2). Mot. at 19-20. Certification  
 17 is appropriate because plaintiffs challenge a “pattern or practice that is generally applicable to the  
 18 class as a whole.” *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). In particular, plaintiffs  
 19 challenge RAC’s unlawful pricing, as well as its violation of the Karmette Act’s single-document  
 20 requirement. Plaintiffs need not show that every class member has been injured to demonstrate  
 21 that RAC’s unlawful pricing practices are “generally applicable.” *See supra* at 6. Moreover, with  
 22 respect to the single document issue, “RAC is not disputing that the same practice was applied to  
 23 all class members during the class period.” Opp. at 12 n.12. Accordingly, Rule 23(b)(2)  
 24 certification is appropriate.

#### 25 **III. CONCLUSION**

26 For the reasons stated, plaintiffs request the Court certify the proposed class and subclass,  
 27 appoint Paula Blair, Andrea Robinson, Falechia Harris, and Celinda Garza as class representatives,  
 28 and appoint Dostart Hannink & Coveney LLP and Altshuler Berzon LLP as class counsel.

1 Dated: July 12, 2018

Respectfully submitted,

2 DOSTART HANNINK & COVENEY LLP  
3 ALTSHULER BERZON LLP

4 /s/ Michael Rubin

Michael Rubin

5 Attorneys for Plaintiffs

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